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No. 86-1934

In the Supreme Court of the United States

OCTOBER TERM, 1987

JERRY W. TEDDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the absence of an instruction permitting the court-martial panel to infer that petitioner's use of marijuana was wrongful shifted the burden of proof on that element of the offense from the government to petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Sandstrom v. *Montana*, 442 U.S. 510 (1979) 6
United States v. *Fisher*, 21 M.J. 327 (C.M.A. 1986) 5

Constitution, statutes, and rule:

U.S. Const. Amend. V (Due Process Clause) 5
Uniform Code of Military Justice, 10 U.S.C. (& Supp. III) 801 *et seq.*:
Art. 60, 10 U.S.C. (& Supp. III) 860 2
Art. 66(c), 10 U.S.C. 866(c) 4
Art. 112a, 10 U.S.C. (Supp. III) 912a 2
~~Mil. R. Evid. 404(a)(1) ..... 9~~

Miscellaneous:

Manual for Courts-Martial, United States—1984 ..... 5, 6

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 129. The opinion of the Army Court of Military Review (Pet. App. 2a-4a) is unpublished.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 8, 1987. The petition for a writ of certiorari was filed on June 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a special court-martial at Fort Bragg, North Carolina. Petitioner was convicted of the wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. He was sentenced to six months' confinement, partial forfeiture of his pay, a reduction in rank, and a bad conduct discharge. Pursuant to Article 60, UCMJ, 10 U.S.C. (& Supp. III) 860, the convening authority reviewed the case and approved only so much of the sentence as provided for confinement for four months, partial forfeiture of pay, a reduction in rank, and a bad conduct discharge. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 2a-4a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. At the time of the offense, petitioner was a non-commissioned officer in the 82d Airborne Division at Fort Bragg, North Carolina. On November 5, 1984, petitioner submitted a urine sample during a urinalysis test (Tr. 50-51, 57-71, 87-90). All of the urine samples from petitioner's unit were delivered to CompuChem Laboratories the following day (GX 3, at 4). CompuChem's testing of petitioner's urine sample revealed the presence of tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana (GX 3, at 1).[1]

At trial, the government presented evidence regarding the procedures and methods used to secure

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[1] THC can be found in the urine only if "it's put directly into the urine by somebody—by ingesting it, by smoking it, or by injecting it into the veins" (Tr. 230).

petitioner's urine sample for testing (Tr. 57-83, 85-92). Three witnesses explained the procedures used in the receipt, testing, and safeguarding of petitioner's urine sample (Tr. 100-166, 167-172, 218-300). The evidence showed that petitioner's urine tested positive for the presence of THC in a concentration almost two-and-a-half times the concentration necessary to produce a "positive" test result (Tr. 230, 260-261). Petitioner testified in his own defense. He denied using marijuana, and he stated that he "ha[d] no idea" why his sample was positive (Tr. 318-319). Petitioner also presented testimony from three officers and two non-commissioned officers as to his good military character (Tr. 305-316).

As part of his preliminary instructions, the trial judge advised the court-martial panel that "[u]nder the law the accused is presumed to be innocent of the offense. The government has the burden of proving the accused's guilt beyond a reasonable doubt" (Tr. 13). At the close of the evidence, the trial judge gave the following instructions (Tr. 340-341, 342):

> You may find the accused guilty of an offense only if you're convinced as to guilt by legal and competent evidence, beyond a reasonable doubt, as to each and every element of that offense. * * * You must be convinced by legal and competent evidence beyond a reasonable doubt that, at Fort Bragg, North Carolina, between 5 October and 5 November 1984, the accused used marijuana. And that, two, the use by the accused was wrongful. * * *
>
> You're further advised that, first, the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond

> a reasonable doubt. Second, if there's a reasonable doubt as to the guilt of the [accused], then the doubt must be resolved in favor of the accused and he must be acquitted. And lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the Government. The burden never shifts to the accused to establish innocence or disprove the facts necessary to establish each element of the offense.
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> * * * * *
>
> The rule as to reasonable doubt extends to every element of the offense * * *. [I]n weighing and evaluating the evidence you're expected to utilize your own common sense, your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. * * * You may properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with the one.

Petitioner did not object to these instructions, nor did he request additional instructions.

On appeal, the Army Court of Military Review affirmed petitioner's conviction (Pet. App. 2a-4a).[2] The Court of Military Appeals also affirmed petitioner's conviction (Pet. App. 1a).

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[2] Article 66(c), UCMJ, 10 U.S.C. 866(c), authorizes a court of military review to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." The Court of Military Review independently reviewed the sufficiency of the evidence against petitioner and concluded that he was guilty.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the trial judge's failure to instruct the court-martial panel that it could infer that his use of marijuana was wrongful violated the Due Process Clause. Petitioner did not assert that complaint at trial, however, and has therefore waived his claim in the absence of plain error. Rule for Courts-Martial 920(f), *Manual for Courts-Martial, United States—1984* [hereinafter *Manual*]; *United States* v. *Fisher*, 21 M.J. 327 (C.M.A. 1986) (standard of review for instructional error raised for the first time on appeal is plain error). In any event, petitioner's claim lacks merit.

Petitioner argues that the " 'mystique' of urinalysis" (Pet. 8)[3] combined with the trial court's failure to give an appropriate instruction on a permissive inference of wrongfulness would have led the jury to conclude that the government had to prove only that he used marijuana, and not that his use was also wrongful. That contention is novel, but without substance, since it ignores the correct instructions given by the trial judge. The trial judge made clear that the government bore the burden of proving each element of the charged offense beyond a reasonable doubt, and that wrongfulness was one such element (Tr. 340-343). The trial judge therefore did not take

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[3] Insofar as petitioner suggests that the court members were unduly impressed by a scientific process, we would note that all of the court-martial panel members acknowledged during voir dire that urinalysis test results are not evidence of such great weight that further consideration of guilt or innocence is foreclosed (Tr. 27-29). Moreover, all panel members indicated a belief in the fallibility of the laboratory that performed the urinalysis on which the charges against petitioner were based (Tr. 29-31).

this issue away from the court-martial panel. In addition, the panel was instructed that it could "properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with the one" (Tr. 342). Implicit in that guidance is the notion that the jury was free to believe or disbelieve petitioner's contention that he had "no idea" of how THC was found in his urine (Tr. 319). In fact, the only mandatory presumption referred to by the trial judge was that petitioner was presumed to be innocent of the crime (Tr. 339, 341). Accordingly, no reasonable panel member could have concluded that the government was not required to prove that petitioner's use of marijuana was wrongful. See *Sandstrom* v. *Montana*, 442 U.S. 510, 514 (1979).

2. Petitioner maintains (Pet. 9-12) that it is irrational to infer that his use of marijuana was wrongful in the absence of direct proof on this issue. Petitioner also argues (Pet. 12-14) that the permissive inference authorized by *Manual* Pt. IV para. 37c(5) does not apply where, as here, the defendant has rebutted the inference by offering evidence that his use of marijuana was innocent.[4] Those conten-

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[4] Petitioner presented very little evidence challenging the wrongfulness of his use of marijuana. He presented a "good soldier" defense (Tr. 305-316); defense counsel's cross-examination essentially consisted of an attack on the laboratory procedures (Tr. 53-54, 75-77, 92, 125-135, 138-147, 164-165, 205-214, 262-286, 292-297); and defense counsel's closing argument focused exclusively on the possibility that the laboratory had made a mistake and on petitioner's good military character (Tr. 327-334). Defense counsel asked only three questions vaguely suggesting that petitioner had innocently ingested marijuana (Tr. 286). In short, petitioner's defense focused on the "use" element of the offense, not on

tions are not materially different from the claims presented in the petition in *Douglas* v. *United States*, No. 86-1893. For the reasons given in our brief in opposition in that case,[5] further review of petitioner's claims is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the "wrongfulness" element. In light of the paucity of evidence rebutting the showing of wrongfulness, petitioner's theory appears to be that a permissive inference of wrongfulness would be improper if the accused uttered a bare denial of wrongdoing.

[5] We have provided petitioner's counsel with a copy of our brief in *Douglas*.

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